Construction and Engineering eNews: January 2012

Failure of unjust enrichment argument

Costello –v- MacDonald [2011] BLR 544 Court of Appeal

Mr and Mrs Costello owned some land and wanted to develop it with 8 new houses. They had a limited company which they called Oakwood Residential Limited. Oakwod Residential Limited placed a contract to construct 8 new houses on the plot with MacDonalds. The work was carried out but the company did not pay all the invoices. Mr and Mrs Costello now had 8 houses on their land, which they were able to let and receive rental income. The builders decided to sue Mr and Mrs Costello (presumably because Oakwood Residential Limited did not have enough money to be worth suing).

HELD:

The Court of Appeal held that although Mr and Mrs Costello had benefitted from and had been enriched by the work carried out by the builders, there was no contract whatsoever between them and the builders. The builders had taken a contractual risk by entering into a contract with Oakwood Residential and arguments based on unjust enrichment would fail. The prevailing rule is that there is a "veil of incorporation" which protects the shareholders and directors of companies from being sued for their company's actions including failures to pay.

Comment:

1. The veil of incorporation principle is long established. The most surprising thing about this case is that the first instance judge agreed to set it aside.

2. MacDonalds should have been advised to put Oakwood into liquidation and the work with the liquidator to pursue the Costellos as directors of Oakwood for wrongful trading, and breach of their fiduciary duty to the company. See *Roberts –v- Frohlick* reported in our Muckle Construction briefing earlier this year.

Contract Formation. Contributory Negligence in Contract Disputes

Trevor Bassett Holdings –v- ADT Fire and Security [2011] BLR 661.TCC

Trebor Bassett decided to expand their sweetie factory in Pontefract and asked ADT for a quote for a carbon dioxide suppression system (fire protection) for its popcorn production line. ADT sent a quote including its own standard terms of business excluding or reducing liability for any breaches. Trebor Bassett replied with a purchase order accepting the quotation but including its own standard terms of purchase. A huge fire broke out which the ADT system failed to detect or suppress and £110m of damages was caused.

HELD:

1. The purchase order was not an acceptance of ADT's terms, because it included the Trebor terms which were inconsistent with such an acceptance. Therefore when ADT subsequently started work, this amounted to an acceptance of an offer by Trebor Bassett expressed in the purchase order. Trebor's terms therefore applied.

2. Trebor were found to have been negligent in a number of respects and their negligence was a major factor in the occurrence of the fire. They were held to be 75% responsible which reduced ADT's exposure to the claim to 25% of £110m.

Comment

1. This case demonstrates the care that has to be taken by the commercial managers on both sides in forming a major contract. ADT may have assumed that it had a purchase order which accepted its terms, but a prudent commercial manager would have written back insisting that Trebor Bassett withdrew its reference to its own standard terms before ADT started work.

2. Parties do not always anticipate the extent of the risk they are taking on. The fee for this fire suppression system was £9,000!

3. It is not generally realised that the concept of contributory negligence applies not only in "negligence claims" in tort, but also between contracting parties. A may be liable for breach of contract to B but if B's negligence has exacerbated B's loss, then B's claim would be discounted by the percentage equivalent to the proportion of blame which B must carry.

Can an Adjudicator recover his fees where he has produced an invalid decision?

Systech –v- Harrington Contractors CLL (2011) Technology and Construction Court

Harrington was working on 3 major projects including Wembley Stadium and in each case sub-contracted steel reinforcement works to Tyroddy. Tyroddy took Harrington to adjudication in respect of retention monies pursuant to each of the 3 contracts (see e-News of May 2011).

The Court held that the Adjudicator's decisions in favour of Tyroddy were unenforceable due to breaches of natural justice. Meanwhile Systech, as employer of the Adjudicator, had sent Harrington an invoice for fees. Harrington obtained a declaration from the TCC accordingly. Harrington subsequently informed Systech that it would not be paying the Adjudicator's fees and Systech sued.

HELD:

1. The contract to perform adjudication services involved the performance by the Adjudicator of a number of services including considering all the evidence, reading all the submissions, administering the adjudication and of course delivering his Decision. Although his decision was ultimately held to be unenforceable on natural justice grounds, it was not true to say that the Adjudicator was guilty of a "total failure of consideration".

2. The consideration from Harrington was its share of the fee, the consideration from the adjudicator was the performance of the services. He had performed most of the services and the fact that he had not performed one, albeit the most important, was not sufficient to justify the conclusion that there had been a "total failure of consideration". Consequently, Harrington was ordered to pay up.

Comment:

1. Adjudicators will usually have payment of their fees supported by the Courts unless it is proven that they have acted dishonestly, fraudulently or in bad faith.

2. The Judge went out of his way to stress that where an adjudicator has done "his honest best" in performing his role as adjudicator, even if ultimately the Decision is unenforceable, the Court would be very slow to find that his fee was not enforceable.

3. There is a strong public policy commitment to supporting the adjudication process. Adjudicators are repeatedly faced with the challenges to their jurisdiction and to their decisions on "natural justice" grounds, many of which are spurious. If an adjudicator is worried that by being robust and standing up to such challenges, he risks doing a lot work for no pay, then he is likely to err on the side of caution, and this will encourage bullying tactics towards adjudicators.